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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120416008-2219-01]

RIN 0648-BB72

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic;
Reef Fish Fishery of the Gulf of Mexico; Amendment 34

AGENCY: National Marine Fisheries Service (NMFS), National
Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement management measures described in Amendment 34 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). If implemented, this rule would remove the income qualification requirements for renewal of Gulf of Mexico (Gulf) commercial reef fish permits and increase the maximum crew size to four for dual-permitted vessels (i.e. vessels that possess both a charter vessel/headboat permit for Gulf reef fish and a commercial vessel permit for Gulf reef fish) that are fishing commercially. The intent of this rule is to remove permit requirements that may no longer be applicable to current

commercial fishing practices and to improve vessel safety in the Gulf reef fish fishery.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on the proposed rule identified by "NOAA-NMFS-2012-0025" by any of the following methods:

- Electronic submissions: Submit electronic comments via the Federal e-Rulemaking Portal:
<http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Steve Branstetter, Southeast Regional Office,
NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and NMFS will post them to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: <http://www.regulations.gov>, enter "NOAA-NMFS-2011-0025" in the search field and click on "search". After you locate the proposed rule, click the "Submit a Comment" link in that row.

This will display the comment web form. You can enter your submitter information (unless you prefer to remain anonymous), and type your comment on the web form. You can also attach additional files (up to 10MB) in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this rule will not be considered.

For further assistance with submitting a comment, see the "Commenting" section at <http://www.regulations.gov/#!faq>s or the Help section at <http://www.regulations.gov>.

Electronic copies of Amendment 34, which includes an environmental assessment and a regulatory impact review, may be obtained from the Southeast Regional Office Web Site at <http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm>.

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted in writing to Anik Clemens, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; and OMB, by e-mail at OIRASubmission@omb.eop.gov, or by fax to 202-395-7285.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, Southeast Regional Office, NMFS, telephone 727-824-5305; e-mail: Steve.Branstetter@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS and the Council manage the Gulf reef fish fishery under the FMP. The Council prepared the FMP and NMFS implements the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

This rule would implement Amendment 34 to the FMP, which addresses administrative issues relative to earned income requirements for the renewal of commercial Gulf reef fish permits and to the maximum crew size for dual-permitted vessels while commercially fishing. Due to recent changes in the commercial sector of the Gulf reef fish fishery the income qualification requirements and the crew size limit regulations may no longer effectively serve their original purposes.

Measures Contained in This Proposed Rule

If implemented, this rule would eliminate the income qualification requirements for renewal of commercial Gulf reef fish permits and increase the maximum crew size from three to four for dual-permitted vessels.

Eliminating the Income Qualification Requirements for Commercial Gulf Reef Fish Permits

Under the current regulations, an applicant renewing a commercial vessel permit for Gulf reef fish must attest that greater than 50 percent of his/her earned income is derived from commercial fishing (i.e. harvest and first sale of fish) or

charter fishing during either of the 2 calendar years preceding the application. Applicants must complete the Income Qualification Affidavit section on the Federal Permit Application for Vessels Fishing in the EEZ (Federal Permit Application) as proof of meeting permit income qualification requirements for commercial Gulf reef fish vessel permits.

This rule proposes to eliminate the income requirement because it is no longer applicable to current commercial fishing practices. The income requirement is not compatible with recent regulatory changes in the Gulf reef fish fishery, such as the implementation of individual fishing quota (IFQ) programs for red snapper and grouper/tilefish species, which account for the majority of Gulf reef fish landings. Regardless of the proportion of a fisherman's income derived from commercial or charter fishing, participation in these IFQ fisheries is restricted to those who possess quota shares or who sell annual allocation. Removing the income requirement will also provide more flexibility to fishermen and allow them to earn income in other occupations. This added flexibility would allow some fishermen to renew their permits even if they did not have the opportunity to earn enough income from fishing. In addition, this income requirement is relatively easy to meet or circumvent, and validation of this income requirement has been difficult. Finally, the elimination of income requirements

would also decrease the administrative burden to NMFS and the applicant by simplifying the permit renewal process.

Increasing the Maximum Crew Size for Dual-Permitted Vessels

The final rule for Amendment 1 to the FMP (55 FR 2078, January 22, 1990) established the commercial vessel permit for Gulf reef fish and the three-person crew size for dual-permitted vessels when fishing commercially. In 2006, Amendment 18A to the FMP modified the crew size rule to add the Coast Guard certificate of inspection (COI) provision that allowed vessels with a COI to carry a minimum crew size specified by the COI if it was greater than three. Amendment 18A was intended to resolve conflict between the Council's maximum crew size rule and the Coast Guard's minimum crew size requirements for vessels with a COI, which was at least four.

Historically, limiting the crew size on a dual-permitted vessel when fishing commercially may have served to prevent a vessel from taking out a number of passengers under the pretense of making a charter trip, but subsequently selling the catch. Under current commercial fishing practices, limiting the crew size of a vessel to prevent selling catch caught on a charter trip is no longer a primary concern. IFQ programs now regulate commercially harvested red snapper, grouper, and tilefish species, which constitute the majority of the commercial reef fish landings. In addition, all commercial Gulf reef fish

vessels are required to be equipped with vessel monitoring systems. The strict reporting requirements of these management measures make it clear when a vessel is operating as a commercial vessel. The amount of IFQ shares owned by a permit holder limits the amount of fish harvested by a vessel regardless of the crew size. In addition, due to the costs involved with carrying extra crew, there would be little incentive to exceed the necessary crew size.

Currently, 154 vessels possess both a charter vessel/headboat permit and a commercial vessel permit for Gulf reef fish. These vessel are considered to be dual-permitted vessels. Unless the vessel has a COI, dual-permitted vessels are limited to a three-person maximum crew size. The current crew restriction limits are of particular concern for vessels conducting commercial spearfishing operations. These activities would be considered commercial diving operations under the Occupational Safety and Health Administration (OSHA) regulations. The OSHA regulations for SCUBA diving operations (29 CFR 1910.424(c)) require that: (1) A standby diver is available while the SCUBA diver is in the water and (2) The SCUBA diver must be either line-tended or accompanied by another diver with continuous visual contact. The OSHA regulations aim to establish safe operating procedures for conducting commercial SCUBA diving; however, the three-person crew limit for dual-

permitted vessels impairs the crew's ability to comply with OSHA and decreases the safety at sea, which violates National Standard 10 of the Magnuson-Stevens Act (16 U.S.C. 1851(a)(10)). Based on OSHA regulations, if two divers are underwater spearfishing, the third crewmember at the surface would need to handle the vessel and be the standby diver. If it is necessary to have two crew members at the surface, only one diver could be underwater and would need to be line-tended. Spearfishing while being line-tended could cause additional safety issues.

In addition, the Coast Guard Diving Policies and Procedures Manual (2009) states that "[a] minimum of four personnel consisting of a diving supervisor, diver, diver tender and a standby diver are required to conduct SCUBA operations." While this is not a regulation applicable to commercial spearfishing vessels, it provides guidance to increase safety of the diving personnel.

This rule proposes to increase the crew size from three to four for dual-permitted vessels to improve the safety at sea issues while commercially spearfishing, which would comply with National Standard 10 of the Magnuson-Stevens Act. In addition, it allows commercial spearfishing vessels to comply with the OSHA diving regulations and the U.S. Coast Guard guidance for conducting diving operations.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the AA has determined that this proposed rule is consistent with Amendment 34, the Magnuson-Stevens Act and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows:

The purpose of this proposed rule is to eliminate existing income qualification requirements that may no longer be applicable to the current commercial fishing environment and to improve vessel safety in the Gulf reef fish fishery. The Magnuson-Stevens Act provides the statutory basis for this proposed rule.

This rule, if implemented, would be expected to directly affect 920 vessels that possess a commercial reef fish permit. Among these entities, 154 vessels also possess a reef fish for-hire permit. These vessels would be affected by both actions in this proposed rule. The average commercial vessel in the reef

fish fishery is estimated to earn approximately \$48,000 (2010 dollars).

The for-hire fleet is comprised of charterboats, which charge a fee on a vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The average charterboat is estimated to earn approximately \$89,000 (2010 dollars) in annual revenue, while the average headboat is estimated to earn approximately \$469,000 (2010 dollars). The average revenue profile of dual-permitted vessels is not available.

There have been no other small entities identified that would be expected to be directly affected by this proposed rule.

The Small Business Administration has established size criteria for all major industry sectors in the U.S. including fish harvesters. A business involved in fish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$4.0 million (NAICS code 114111, finfish fishing) for all its affiliated operations worldwide. The revenue threshold for a business involved in the for-hire fishing industry is \$7.0 million (NAICS code 713990, recreational industries). Based on the average revenue estimates provided above, all commercial and for-hire vessels expected to be directly affected by this

proposed rule are determined for the purpose of this analysis to be small business entities.

Neither action in this proposed rule would be expected to result in any reduction in profits for any small entities. The two proposed actions would either eliminate or lessen a current restriction. The proposed elimination of an income requirement for the Gulf commercial reef fish permit is expected to provide the opportunity for fishermen to increase income from non-fishing occupations without jeopardizing their ability to renew their commercial reef fish permit. This would also eliminate the pressure to continue to fish to maintain fishing income to satisfy a permit requirement when personal, economic, or other factors may suggest fishing should not occur. Finally, this rule would reduce the reporting and recordkeeping burdens currently imposed on applicants. In particular, applicants would no longer be required to complete the Income Qualification Affidavit section on the Federal Permit Application for Vessels Fishing in the EEZ (Federal Permit Application) as proof of meeting permit income qualification requirements for commercial Gulf reef fish vessel permits. As a result, although the effects are not quantifiable with available data, this proposed action would be expected to increase the economic benefits to small entities.

The proposed increase in the maximum crew size from three to four persons for dual-permitted vessels would allow increased flexibility for affected vessels to carry the number of crew best suited to the needs or conditions of the trip. As a result, although the effects are again unquantifiable with available data, increased economic benefits would be expected to accrue to fishermen as a result of this increased flexibility. Therefore, the economic effects on small entities of this proposed rule, if implemented, are expected to be positive and not constitute a significant economic impact on a substantial number of small entities.

Because this proposed rule, if implemented, would not be expected to have a significant economic impact on any small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection-of-information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection-of-information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule contains collection-of-information requirements subject to the PRA. NMFS estimates the removal of

the income qualification requirements for commercial Gulf reef fish permit holders will result in a net decrease in the time to complete the Federal Permit Application (for all applicants), however, the current burden estimate (20 minutes per applicant) to complete the application form would not decrease because the time to complete the Income Qualification Affidavit is minimal compared to the time to complete the entire application.

These requirements have been submitted to OMB for approval. NMFS seeks public comment regarding: Whether this proposed collection-of-information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection-of-information, including through the use of automated collection techniques or other forms of information technology. Send comments regarding the burden estimate or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see ADDRESSES).

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and
recordkeeping requirements, Virgin Islands.

Dated: July 13, 2012.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
performing the functions and duties of the Assistant Administrator for Fisheries,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622
is proposed to be amended as follows:

PART 622--FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read
as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 622.2, the definition for "charter vessel" is
revised to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Charter vessel means a vessel less than 100 gross tons
(90.8 mt) that is subject to the requirements of the USCG to

carry six or fewer passengers for hire and that engages in charter fishing at any time during the calendar year. A charter vessel with a commercial permit, as required under § 622.4(a)(2), is considered to be operating as a charter vessel when it carries a passenger who pays a fee or when there are more than three persons aboard, including operator and crew, except for a charter vessel with a commercial vessel permit for Gulf reef fish. A charter vessel that has a charter vessel permit for Gulf reef fish and a commercial vessel permit for Gulf reef fish is considered to be operating as a charter vessel when it carries a passenger who pays a fee or when there are more than four persons aboard, including operator and crew. A charter vessel that has a charter vessel permit for Gulf reef fish, a commercial vessel permit for Gulf reef fish, and a valid Certificate of Inspection (COI) issued by the USCG to carry passengers for hire will not be considered to be operating as a charter vessel provided--

(1) It is not carrying a passenger who pays a fee; and

(2) When underway for more than 12 hours, that vessel meets, but does not exceed the minimum manning requirements outlined in its COI for vessels underway over 12 hours; or when underway for not more than 12 hours, that vessel meets the minimum manning requirements outlined in its COI for vessels underway for not more than 12-hours (if any), and does not

exceed the minimum manning requirements outlined in its COI for vessels that are underway for more than 12 hours.

* * * * *

3. In § 622.4, paragraphs (m)(3), (m)(4), and (m)(5) are removed; paragraph (m)(6) is redesignated as paragraph (m)(3); and paragraphs (a)(2)(v) and (m)(2) are revised to read as follows:

§ 622.4 Permits and fees.

(a) * * *

(2) * * *

(v) Gulf reef fish. For a person aboard a vessel to be eligible for exemption from the bag limits, to fish under a quota, as specified in § 622.42(a)(1), or to sell Gulf reef fish in or from the Gulf EEZ, a commercial vessel permit for Gulf reef fish must have been issued to the vessel and must be on board. If Federal regulations for Gulf reef fish in subparts A, B, or C of this part are more restrictive than state regulations, a person aboard a vessel for which a commercial vessel permit for Gulf reef fish has been issued must comply with such Federal regulations regardless of where the fish are harvested. See paragraph (a)(2)(ix) of this section regarding an IFQ vessel account required to fish for, possess, or land Gulf red snapper or Gulf groupers and tilefishes and paragraph (a)(2)(xiv) of this section regarding an additional bottom

longline endorsement required to fish for Gulf reef fish with bottom longline gear in a portion of the eastern Gulf. See paragraph (m) of this section regarding a limited access system for commercial vessel permits for Gulf reef fish.

* * * * *

(m) * * *

(2) A permit holder may transfer the commercial vessel permit for Gulf reef fish to another vessel owned by the same entity. A permit holder may also transfer the commercial vessel permit for Gulf reef fish to the owner of another vessel or to a new vessel owner when he or she transfers ownership of the permitted vessel.

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